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IN THE

Supreme Court of the United States

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~~IN VACATION~~

No. 3071

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PERRY PUBLICATIONS, INC.
PALM BEACH POST-TIMES AND
PENSACOLA NEWS JOURNAL DIVISIONS
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

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FREE PRESS PUB. CO., INC. - TAMPA

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is unreported and is printed in the Appendix hereto (App. A-1).[1]

[1] References to the Appendix are hereinafter designated "App." References to the Official Record of the proceedings in this case are designated "R", and references to material contained in the Joint Appendix below are designated "J.A."

JURISDICTION

1. The opinion of the Court of Appeals was entered on March 27, 1967, in the United States Court of Appeals for the Fifth Circuit (App. A-1). An Order denying rehearing was filed on or about May 25, 1967. Petition for Stay of the Decree of the Court of Appeals was filed on May 29, 1967, and was denied by Order of the Court of Appeals on June 20, 1967 (App. A-25). Upon denial of the Petition for Stay the Court of Appeals entered a decree enforcing the Order of the National Labor Relations Board (App. A-26). Petition for Stay of the decree, or execution of the decree, of the Court of Appeals was mailed to the Supreme Court of the United States on June 23, 1963, addressed to the Honorable Hugo L. Black, Associate Justice of the Supreme Court (App. A-28). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(i). The jurisdiction of the United States Court of Appeals in this cause was invoked under Section 10(e) of the National Labor Relations Act, as amended (61 Stat 136, 73 Stat 519, 29 U.S.C. Section 151 et seq.).

QUESTIONS PRESENTED

FINDINGS OF THE TRIAL EXAMINER AS TO FACT AND LAW WHICH WERE ACCEPTED.

1. The findings of the Trial Examiner and the Board were not based on substantial evidence contained in the record considered as a whole, but were based upon evidence which was improperly considered, inadequately developed, and without substantial basis in fact. Therefore, the Order of the Board was not entitled to enforcement by the Court of Appeals and the Court of Appeals committed reversible error in ordering enforcement of the said Order.

2. Throughout the course of the proceedings before the National Labor Relations Board and the United States Court of Appeals, the Petitioner has been consistently denied due process of law as guaranteed by the Fifth Amendment to the Constitution of the United States, in that:

(a) Cases involving two distinct and separate divisions of the Petitioner, Perry Publications, Inc., were improperly consolidated for hearing and were heard jointly in spite of the fact that the conditions and circumstances surrounding the separate cases were highly dissimilar and unconnected.

(b) Petitioner's repeated Motions for severance of the two cases and for separate hearings were uniformly and constantly denied.

STATUTES INVOLVED

The pertinent statutory provisions involved in this case are set forth in the Appendix at page A-32.

STATEMENT OF THE CASE

This case originally came before the Court of Appeals on the Petition of the National Labor Relations Board to enforce an Order of the Board which found the Petitioner herein guilty of having committed certain unfair labor practices at the Palm Beach Post-Times and Pensacola News Journal Divisions (R 205-214, 244-246). Specifically, the National Labor Relations Board found, *inter alia*, that the Petitioner violated Section 8(a)(5) and Section 8(a)(1) of the National Labor Relations Act by failing and refusing to bargain collectively and in good faith with the West Palm Beach Local 709 (hereinafter referred to as Local 709), and Pensacola Local 293 (hereinafter referred to as Local 293),

of the International Typographical Union, AFL-CIO (hereinafter referred to as the Union). The Board further found that the Petitioner herein engaged in, and continues to engage in, unfair labor practices within the meaning of Sections 8(a)(3) and 8(a)(1) of the Act, by discriminating in regard to hire and tenure certain of its employees and by interfering with, restraining and coercing its employees in the exercise of rights guaranteed to them by Section 7 of the Act.

The Petitioner, Perry Publications, Inc., owns and operates several newspapers within the State of Florida (R.122-123), two of which are directly involved in this case. The Palm Beach Post-Times and the Pensacola News Journal Divisions are, and since July 1, 1962, have been, separate divisions of Perry Publications, Inc., (R 123). On November 30, 1960, the agreement between the Palm Beach Post-Times and Local 709 expired by its own terms and the parties to that agreement entered into negotiations on a new contract (R.23). In the period of time between the commencement of negotiations and January, 1963, many changes and innovations were introduced in the operations of the Palm Beach Post-Times, which resulted in the use of such newly developed devises as photocomposing machines and computers (R.126-127). These devices were introduced into the Palm Beach Post-Times operations to consolidate expenses and to simplify the many time consuming facets of newspaper operations (R.126-128). The utilization of these machines required certain personnel adjustments among employees working at the time use of the machines began and required the hiring of new personnel qualified to perform the duties incident to the operation of the new equipment (R.128-131). New job classifications were, of necessity, created for these new employees (R.128-131).

During the time between the expiration of the old contract between Perry Publications, Inc., and Local 709, many bargaining sessions were held between the parties, dealing with the many problems of union-management relations, but as of January 23, 1963, no agreement had been reached between the parties (R. 126-127, 131).

After January 23, 1963, a dispute arose between the Palm Beach Post-Times and Local 709 concerning union jurisdiction over the new employees who were working in job classifications created by the operation of the newly installed equipment mentioned above (R. 132). The Petitioner herein maintained that these new employees and their respective job classifications were not within the Union's jurisdiction, there having been no mention of them in the previous contract between the parties which had been signed well in advance of the time at which the new job classifications came into existence, (R.126). After extended bargaining on this question the Petitioner acceeded to Union jurisdiction over the new job classifications and provided the Union with information concerning these job classifications (R.149).

Also, during this time several employees of the Palm Beach Post-Times were either discharged, laid-off, or disciplined by the Petitioner in what the Union considered a discriminatory manner (R.133-137). Without exception these actions were taken as a result of continued incompetence, violations of company policy, refusal to work, or other improper behavior on the part of the affected employees (R.184, 185, 187, 167-168, 173-174, 198). These various actions on the part of the Petitioner were made the subjects of grievance procedures and were discussed by the parties during negotiations (135-138).

On September 30, 1963, the contract between the Pensacola News Journal and Local 293 expired on notice given by each party (R.139, J.A.62-65), and negotiations totally separate and distinct from those being carried on at the Palm Beach Post-Times were begun (R.139). These negotiations remained separate from those conducted at the Post-Times until shortly before the strikes against the Post-Times and the Pensacola News Journal began and even after the strikes commenced separate bargaining sessions were held.

On November 3, 1963, the two local Unions held meetings and passed identically worded strike resolutions, with only necessary changes in the names, against the Post-Times and the Pensacola News Journal, respectively (R.147). Chronologically, the agreement between the Palm Beach Post-Times and Local 709 concerning jurisdiction of the Union over the new job classifications occurred subsequent to the passage of the strike resolutions. The resolution of the jurisdictional disputes led the Unions to take the position that no disagreement whatsoever existed between the parties, (J.A. 789). The resolution of the jurisdictional question, according to Union representatives, left only economic issues undecided (J.A. 789).

On November 6, 1963, the Petitioner submitted to Local 709, a proposal dealing with graduated wage scales for employees in the new job classifications, which wage scales were made necessary by the very nature of the jobs involved, (R.150-151). No agreement was reached on this wage scale proposal and on November 9, 1963, both Local 709 and 293 went out on strike, (R.153-154). The record reveals that at the time Locals 709 and 293 went out on strike the only issues between the parties to the negotiations which were left unresolved were issues of a purely economic nature (R.153, J.A.809).

~~This being so, the strikes against the Pensacola News Journal and Palm Beach Post-Times were economic strikes and in violation of Section _____ of the Act (App. _____).~~ The record contains evidence offered by the General Counsel which shows that the strikes were called in support of contract demands (J.A.270). Since the time of the strike every Union request for a meeting has been accepted and the Petitioner has never refused to meet with the Union (J.A.810).

Changes alleging separate and distinct violations of the Act were filed against each of the two divisions of Petitioner, Perry Publications, Inc., by the local unions at each paper, (R.9, 22, 41, 47). The Board issued complaints on these charges and ordered the cases consolidated for hearing (R.53). The Petitioner moved, at the earliest possible date to sever the cases and for separate hearing (R.75-77), and this Motion was denied (R.81-84). At the outset of the actual hearing the Petitioner renewed its motion to sever and presented argument on its Motion (J.A.5, et seq.). The Motion was denied (J.A.10). As a result the two cases were heard jointly and an Order of the National Labor Relations Board was entered on March 24, 1965, finding the Petitioner guilty of the unfair labor practices specified hereinabove (App. A-6).

On approximately January 26, 1966, the Board filed a petition for enforcement of an Order of the National Labor Relations Board, which the Petitioner answered, praying that enforcement be denied. On March 27, 1967, the United States Court of Appeals for the Fifth Circuit filed its opinion in this case and ordered enforcement (App. A-1).

Petitioner herein timely filed a Petition for Rehearing with the United States Court of Appeals, which Petition was denied (App. A-21). On May 29, 1967,

Petitioner filed a Motion for Stay of the Decree in the Court of Appeals (App. A-22), and this Motion was denied by order of the Court of Appeals on June 20, 1967 (App. A-25). Petition for Stay of the Order of the Court of Appeals has been filed with the Supreme Court of the United States (App. A-28).

REASONS FOR GRANTING WRIT

1. ORDER OF THE BOARD IS WITHOUT SUBSTANTIAL BASIS IN FACT CONTAINED IN THE RECORD CONSIDERED AS A WHOLE, AND THE COURT OF APPEALS COMMITTED REVERSIBLE ERROR BY ORDERING ENFORCEMENT.

It is a matter of settled law that, generally, the findings of the Trial Examiner and the Board as to the facts of a case and the credibility of witnesses are to be accepted by the Court on review. The law does not afford these findings of fact and credibility total immunity from question, however, nor does the law prohibit the refutation of such findings when the case requires, as was made abundantly clear in *Universal Camera Corp. vs. NLRB*, 34 US 474, 95 L.Ed. 456. This Honorable Court, in the *Universal Camera* case, stated, *inter alia:*

> "We do not require that the Trial Examiner's findings be given more weight than in reason and in light of the judicial experience they deserve . . .".

The Court further stated:

> "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. This is clearly significant of the requirement in both statutes that Courts consider the whole record . . ." . . . Congress has merely made it clear that a reviewing Court is not barred from

setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial when, viewed in the light that the record in its entirety furnishes, including the body of the evidence opposed to the Board's view."

The position taken by the Supreme Court in the *Universal Camera* case, supra, has been restated in many cases and can no longer be questioned. *National Labor Relations Board vs. Elias Brothers, Big Boy, Inc.*, 327 F 2d 421 (CA 6, 1964); *National Labor Relations Board vs. Great Atlantic and Pacific Tea Company, Inc.*, 346 F 2d 936 (CA 5 1965); *National Labor Relations Board vs. Arkansas-Louisiana Gas Company*, 333 F 2d 709 (CA 8, 1964); *National Labor Relations Board vs. Local 776, (IATSE Film Editors)*, 303 F 2d 513 (CA 9, 1963).

In accordance with the line of cases cited above, the Petitioner urged the Court of Appeals, in its Brief to that Court, to reject the fact and credibility findings of the Trial Examiner on the grounds that these findings were replete with errors and were based on evidence of an insubstantial nature, (App. A-8). Patently erroneous findings, with no basis in substantial evidence, were made in connection with the Petitioner's alleged refusal to bargain, the jurisdictional dispute between the Petitioner and the Local Unions and the allegedly discriminatory discharges (R.130, J.A. 84), *inter alia*. Moreover, much of the evidence which was accepted by the Trial Examiner and the Board was concerned with events which took place in the years 1960, 1961, and 1962. Section 10(b) of the Act specifically states, *inter alia:*

> "... Provided, that no complaint shall issue based upon any unfair labor practice occurring more than 6 months prior to the filing of the charge with the Board and service of a copy thereof upon the person against whom such charge is made . . ." (App. A-41).

The meaning of this provision of the Act is clear to the effect that any actions, or any evidence of actions, which occurred more than six months prior to the issuance of the Company are irrelevant and immaterial and should have no effect on any complaint or the charges contained therein. It is inconsistent and an obvious contravision of the statutes, to allow material which cannot, itself, provide a basis for the issuance of a complaint to have more than slight effect on later actions where are the basis of a complaint. The Trial Examiner and the Board should have considered evidence of acts prior to the limitation period only as background evidence and should not have allowed it to be used as proof of alleged unfair labor practices.

The Petitioner submits that in the absence of a substantial basis in evidence contained in the record considered as a whole, the Court of Appeals was under no obligation to accept the findings of the Trial Examiner or Board, but was under a duty to deny these findings and to refuse enforcement of the Board's order. Review of the record in this case reveals the totally insubstantial nature of the evidence upon which the Trial Examiner and the Board relied in making the decision in this case. For this reason, the Petition for Writ of Certiorari should be granted, in order that substantial injustice to the Petitioner is not the result of the Court of Appeals' erroneous acceptance of the findings of the Trial Examiner and the Board.

Should this Petition for Writ of Certiorari be denied, the Petitioner will suffer great damage to its rights and will further suffer great damage to its property.

2. PETITTIONER HAS BEEN THROUGHOUT THE COURSE OF THE PROCEEDINGS, DEPRIVED OF DUE PROCESS OF LAW.

Throughout the course of the proceedings, the Petitioner has repeatedly raised the question of, and objected to, the deprivation of due process which it has suffered as the result of improper consolidation of the two separate cases involved in this matter, and the constant refusal on the part of the Board to sever the cases for separate hearings (R. 75-77, J.A. 5, App. A-11).

The original Order of the Board consolidating the cases instituted the denial of due process to the Petitioner by ordering the joint hearing of two cases, each of which are totally unrelated in time, parties and subject matter. Upon consideration of the record as a whole, it is obvious that the connection between the two cases is, at best tenuous, and arises only out of the fact that the two newspapers involved have common ownership. The record contains no evidence of any inter-relationship between the individual papers, but does contain positive evidence that the papers are autonomous, individual divisions of Perry Publicatitons, Inc., and that each controls and formulates its own labor policies and contracts, without regard to the other, (R.75, J.A. 5 et seq.). This being so, the Petitioner can comprehend neither the basis upon which the cases were consolidated, nor the basis upon which refusal to sever the cases were founded.

The Courts have long held that even if the findings and order of the Board are otherwise supported by substantial facts, such findings and orders are not entitled to enforcement if they are obtained without regard to due process of law. *National Labor Relations Board vs. Prettyman,* 117 F 2d 786 (CA 6, 1941). Further, it is unquestionably the duty of the Court on review of an order of the National Labor Relations Board, or any other administrative Board, to determine whether the proceedings of the Board by which the order was obtained comported with the requisites of due process of law, *National Labor Relations Board vs. Baldwin Locomotive Works,* 128 F 2d 39, (CA 3, 1942). The Court of Appeals, in its per curiam decision handed down in the instant case has not responded to, or in any way disposed of, the questions of due process raised by the Petitioner and in failing to do so the Court of Appeals has left unfulfilled its duty to examine the procedures and substance of the case and to insure due process of law to the Petitioner.

The Petitioner submits that the consolidation of these cases was an unreasonable, arbitrary and capricious exercise of the uncontrolled discretion granted to the Board to consolidate cases for hearing. (Rules and Regulations National Labor Relations Board Series 8, As Amended, Sections 102.82, 102.33, 102.72). The fact that power granted to the Board is uncontolled requires that any abuse of this power or any exercise of this power in a manner which is other than reasonable be rejected and given no effect, in order that the object of this power shall not be denied due process.

CONCLUSION

The Petitioner respectfully submits to this Honorable Court that it has been deprived of due process of law and that the Order of the Board was without substantial basis in fact and was not entitled to enforcement by the Court of Appeals.

WHEREFORE, the Petitioner respectfully prays this Court to grant its Petition for Writ of Certiorari and to reverse the Decree of the Court of Appeals.

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CERTIFICATE OF SERVICE

The undersigned certifies that one (1) copy of Petitioner's Writ of Certiorari to The United States Court of Appeals for the Fifth Circuit in the above captioned case has been served this day by Mail upon the following counsel at the addresses listed below:

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Dated at Tampa, Florida,

this _____ day of June, 1967.

APPENDIX